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No. 07-

IN THE

Supreme Court of the United States

CATHERINE R. MAFFEI, individually, and CATHERINE R. MAFFEI and MAUREEN, as trustees of the WALDO M. MAFFEI REVOCABLE TRUST, and EILEEN HANAFIN,

Petitioners,

v.

ROMAN CATHOLIC ARCHBISHOP OF BOSTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the State Have a Sufficient State Interest in Insuring the Propriety of Gifts to Religious Institutions so as to Justify That the Same Laws Apply To These Gifts Which Pertain to All Other Charitable Gifts?

2. Does the Free Exercise of Religion Clause of the First Amendment of the United States Constitution Forbid a Civil Court from Considering the "Trust and Confidence" That May be Engendered in Congregants Solely by Virtue of the Clergy's Religious Authority, in Determining Whether the Congregant's Gift was Based upon a Breach of Trust?

3. Does the Free Exercise of Religion Clause of the First Amendment of the United States Constitution Prevent a Civil Court from Finding a Relationship of "Trust and Confidence" When the Archdiocese Requested its Parishioner on Three Occasions to Transfer Property for the Building of a Church and Promised to Dedicate the Church to the Memory of the Parishioner's Father?

4. Does the Free Exercise of Religion Clause of the United States Constitution Prevent a Civil Court, in Determining Whether there has been a Breach of the "Trust and Confidence", from Considering a Relevant Canon of the Code of Canon Law Issued by the Vatican?

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed appear in the caption. There is no parent or subsidiary company of any party.

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OPINIONS BELOW

The Commonwealth of Massachusetts Supreme Judicial Court on May 25, 2007 issued its decision affirming the judgment of the Middlesex (Massachusetts) Superior Court which dismissed the Plaintiffs' Verified Complaint for Failure to State a claim. The decision of the Massachusetts Supreme Judicial Court is published in the Massachusetts Reports, 449 Mass. 235 (2007). The Plaintiffs filed a Petition for Rehearing. On July 24, 2007, the Supreme Judicial Court issued the amendments to its decision, and otherwise denied the Petition for Rehearing. The amendments to the Supreme Judicial Court opinion are noted in the decision of the Massachusetts Supreme Judicial Court, 449 Mass. 235 (2007). The entry of Judgment after Rescript was entered on the docket of the Middlesex Superior Court on July 30, 2007. The amended decision of the Massachusetts Supreme Judicial Court is attached hereto as Appendix 1a through 33a and the decision of the Middlesex Superior Court as Appendix 34a through 51a.

JURISDICTION

The entry of Judgment after Rescript was entered on the docket of the Middlesex Superior Court on July 30, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Petitioners bring this Petition as the Massachusetts Supreme Judicial Court dismissed the Petitioner's appeal by applying the First Amendment of the United States Constitution, the text of which is:

AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

This case involves the restrictions imposed by the Free Exercise Clause of the First Amendment upon a civil action for breach of trust, as follows: (1) Can a Court consider the "trust and confidence" which a Congregant ordinarily reposed upon a member of the Clergy; (2) If not, does the Congregant have a relationship sufficiently identifiable from the general class of Congregants when the Clergy has contacted him on three separate occasions requesting that the Congregant make a specific gift; and (3) Can the Court consider a relevant provision of the Code of Canon law, where the provision is not in dispute and where the dispute between the Congregant and the Clergy has not been the subject of an ecclesiastical tribunal.

A. The Facts.

The Petitioners were all Parishioners of St. James the Great Church in Wellesley, Massachusetts, which was created by the Archdiocese on September 19, 1950 and which was suppressed by Decree of Suppression effective October 31, 2004. They are signatories to the

Appeal of the Suppression filed by the Parishioners, which is currently pending before the Vatican's Apostolic Signatura.

In the mid-1940's, the Roman Catholic Archdiocese of Boston had two Parishes in Wellesley: St. John the Evangelist Parish and St. Paul's Parish. The Pastor of St. Paul's Parish was Dr. Robert H. Lord, who remained as Pastor until his untimely death in 1954. Prior to becoming Pastor, he had been a Professor of History at Harvard University, an advisor to President Wilson at the Paris Peace Conference, a Professor and Vice-Rector at the Archdiocese's St. John Seminary, and a noted author.

There was a population increase in Wellesley and Natick, which is the municipality on its western boundary. Churches were overcrowded. Rev. Lord was in written communication with the Archdiocese about the need for a new Church to serve the Parishioners of western Wellesley and eastern Natick. The Archdiocese asked him to locate a site. Rev. Lord felt that the best site, and as he later wrote to the Archdiocese, the only site, was a tract of eight acres on Worcester Street (Route 9) in Wellesley owned by the heirs of the late James Maffei.

The late James Maffei and his wife, Angela, had emigrated from Italy. He founded Maffei Sand & Gravel, one of he first "ready mix concrete" pourers in the Eastern United States. In 1925, he purchased a tract of approximately eight acres on the eastbound lane of Route 9 in Wellesley (hereinafter "Maffei property" or "the land"). He used a portion for his gravel business

and held the remainder for development. He and his wife passed away in 1937 and 1943, respectively. As a result of their deaths, title to the property was owned by their six children, as tenants in common. The children were Catholic Parishioners and proud of their father.

One of their children, Waldo Maffei, was an extremely respected and successful member of the community. Rev. Lord on two occasions met with Waldo and his wife, Catherine, in the living room of their Natick home. Rev. Lord requested that the family donate a portion of the property to the Church. Waldo checked with his four brothers and his sister, Mary Maffei, and declined. The Maffei sons, other than Waldo, desired to receive money for their interests.

The Archdiocese had a committee which would inspect and approve proposed sites for a new Church. In the spring of 1946, the Archdiocese committee inspected and approved a portion of the Maffei property as a site for the new Church.

Rev. Lord met with Waldo and Catherine a third time. He proposed that the Church be named, "St. James", after James Maffei. Rev. Lord assured them that the land would forever be used as a Church in tribute to James Maffei. Waldo contacted his brother and sister, who all now agreed to transfer the property, due to the promise to use the property as a Church as a tribute to their father, although the four brothers each also desired to receive $3,000 for each of their interests. Waldo contacted Rev. Lord and told them how much they appreciated the Archdiocese promise to name the Church after James Maffei, but that the four brothers

wished to each receive $3,000. Rev. Lord understood that Waldo Maffei and his sister, Mary, would not be receiving any money for the transfer of their interests. Waldo also assured Rev. Lord that he would be both a founding member and supporter of the Church, both financially and by his personal services. Waldo expressed to Rev. Lord his family's appreciation that the Church be a tribute to James Maffei. Rev. Lord understood that the Maffei family's agreement to transfer the property was based on the understanding that the land would forever be used as a Church as a tribute to James Maffei.

On September 16, 1946, Reverend Lord wrote to the Chancellor and told him that the best site, and indeed the only site, for the new Parish was the Maffei property. He said that "after protracted negotiations" the Maffei heirs had fixed their price at $12,000, or $1,500 an acre, that comparable prices were $2,000 to $2,400 an acre, that the Town of Wellesley had recently paid $2,200 for an acre adjacent to the Maffei land; and that Rev. Lord's advisor, a member of the Wellesley Planning Board, had agreed that $1,500 was a "really cheap price." He also said that the Maffei family had promised a gift of $100 towards the building of the Church. In fact, the Town of Wellesley in 1944 had purchased a 38,330 square foot tract on Route 9 for $3,500.

Rev. Lord's letter of September 16, 1946 requested the Archdiocese Chancellor for authorization to purchase the Maffei land for the sum of $12,000. The Chancellor, by his return letter of that same date, authorized the purchase of the property for the sum of $12,000 and directed Rev. Lord to contact the Archdiocese's lawyer to accomplish the transfer.

Although the Maffeis had hired an attorney to prepare the legal work with respect to the estate of their parents, they did not hire an attorney to prepare, or review, the transfer of the Maffei property to the Archdiocese. Waldo Maffei never told Rev. Lord the Maffeis were hiring an attorney, nor did Rev. Lord ever advise the Maffeis to hire an attorney. No Purchase and Sale Agreement was prepared. Rev. Lord told Waldo Maffei that the Archdiocese would prepare the Deed. The Maffeis did not hire an attorney.

Rev. Lord was the only person with whom the Maffeis dealt with respect to the transfer of the Maffei land. The Maffeis were never introduced to any other official of the Archdiocese nor did they deal with any attorney for the Archdiocese.

The Maffeis, in their Verified Complaint which they filed to commence their action in Middlesex Superior Court, averred that while Rev. Lord understood that the Maffeis were transferring their land on their understanding that the land would be used as a Church in the memory of James Maffei, Rev. Lord also understood that the land, if conveyed by outright deed, would be property owned by the Archdiocese. The Maffeis further averred that it was likely that Rev. Lord also knew that the property, even after a Church was constructed, would be subject to the Canonical process of closure and suppression, but that Rev. Lord did not advise the Maffeis that the Church might someday be subject to this process. The Archdiocese, in its Answer, responded that it had insufficient personal knowledge to admit nor deny these allegations.

The Maffeis, in their Verified Complaint, also averred that if they had known that there was any chance that the Archdiocese could close the Church to be constructed and upon closure the property would then be owned by the Archdiocese for possible sale, the Maffeis would not have agreed to transfer their land.

Rev. Lord knew that Waldo Maffei was relying on the Archdiocese to take all actions necessary to live up to its assurance that the property would forever be used as a Church in the memory of James Maffei.

The Maffeis in their Verified Complaint, alleged that they had reposed trust and confidence in Rev. Lord, which they contend is born out by the following:

(1) The Maffeis were Catholic Parishioners and he had a position in which trust was reposed;

(2) Rev. Lord knew the Maffeis were transferring the property for significantly less than its fair value;

(3) Rev. Lord knew that Waldo and his sister Mary were each receiving no money, and were agreeing to the transfer because the Church was to be named after their father;

(4) Waldo was agreeing to be a founding Member of the Church and to contribute to its construction, and Rev. Lord presumed that Waldo and his family, who ever very well respected, would help sustain the Church;

(5) Rev. Lord knew that the Maffeis were not hiring their own counsel, based on their trust and confidence that Rev. Lord and the Archdiocese would be solemnly bound to fulfill the promise, regardless of the language of any deed; and

(6) Rev. Lord knew that the Maffeis had absolutely no knowledge of Canon law, including the authority of the Archdiocese to suppress a Church.

The Deed of the Maffei property is dated December 19, 1946. Rev. Lord brought the deed to the home of Waldo and Catherine Maffei. The deed simply stated that the transfer was for, ". . . consideration paid", the amount of which was not stated. The Maffei heirs signed the deed on the kitchen table. The Notary Public, Mary Kinsman, lived across the street from James Maffei and notarized the deed for no consideration. Catherine Maffei and the other spouses signed the deed to release curtesy rights. The Maffeis and their spouses signed the deed on the understanding that the property would be used "forever" as a Church and a tribute to James Maffei; if they understood that there was a possibility that it would not, they would not have signed. While Catherine Maffei believes that Rev. Lord did not intend that the Church ever close, she feels that he should have informed them of the possibility of suppression.

Similar to Rev. Lord's promise to Waldo Maffei that Maffei property would forever be a Church in the name of James Maffei, the Parishioners of St. Jeremiah's Church, in the Town of Framingham, which is on the western boundary of Natick, alleged in their action in

Middlesex Superior Court, that at approximately this same time the Moynahan family of Framingham contributed the funds to build St. Jeremiah's Church, specifically to establish a Church for the people of Framingham with the proviso the Church be named after their father, Jeremiah Moynahan, and that the Archdiocese did name the Parish after their father.

The Archdiocese established the Church at the Maffei property and, in 1950, established "St. James Parish." Waldo Maffei was a founding member. The new building was constructed in 1958. The Parishioners paid for the construction. Waldo Maffei contributed $10,000 for the construction of the marble altar at the new Church, which bears the plaque, "Gift of Waldo Maffei and Family."

Waldo and Catherine Maffei were lifelong supporters of the Church. During the construction of the Church, Waldo provided advice as to where to locate the Rectory; donated pledges for the building; supplied equipment to dig the foundations of the Church and rectory; and donated employees, as necessary, during construction. After the Church was built, he donated financially; he plowed and sanded the Church parking lot until 1990; and provided trucks and men for paper drives. He took care of "odd jobs." In the late 1950's or early 1960's, the Pastor asked that Catherine form the Women's Guild, which she did. She always served on the Board of Directors and also served one term as President.

In approximately 1997, the Archdiocese appointed Reverend George Vartzelis ("Rev. Vartzelis") as Pastor. In 1999, the local weekly paper reported that the

Archdiocese had a list of Parishes to close which included St. James. Shortly thereafter, Rev. Vartzelis said at Mass that this was not true. The Plaintiffs allege in the Verified Complaint that the Archdiocese did not inform Rev. Vartzelis of the possibility of closing St. James.

The Archdiocese knew that Rev. Vartzelis, as Pastor, would need to request funds to finance the Church, and that it was likely he would tell Parishioners of the need to support the Church.

In 2002, the Archdiocese had a "Promise for Tomorrow Fund", an Archdiocesan-wide capital and endowment campaign by which each of its 368 Parishes joined together to address the Archdiocese's capital, programmatic and ministerial needs. Each Parish had a "goal", or specific amount of funds to raise. The Archdiocese set a goal for St. James of $370,000. The Flier for St. James the Great Parish stated,

> . . . St. James has grown into a thriving community of faith that consists of almost 900 families . . .

and, later,

> In order to continue our mission as a Church and to reach out to the Catholic community, we must provide for the future.

On June 10, 2002, Rev. Vartzelis sent a letter to St. James Parishioners, making a separate request for $35,000 for refurbishing the Church,

> . . . to keep it as good as it needs to be and was we all want it to be now and for the future.

The Archdiocese knew that Rev. Vartzelis was urging Parishioners to contribute to the upkeep and maintenance of the Church, and that the Parishioners likely would not give if it was represented that the Church could potentially close.

The Statement of Receipts and Expenditures of St. James the Great Parish for the fiscal year July 1, 2000 to June 30, 2001 stated that St. James had receipts of $299,553.25, expenses of $281,903.03, and a transfer to the Archdiocese of $21,961.

Eileen Hanafin was a lifelong member and supporter of the Church who was at this time in her eighties. Rev. Vartzelis knew she was retired and a person of modest financial means and that a contribution of $35,000 was a considerable sacrifice for her to make. Eileen Hanafin had no idea the Church was going to close and she presumed the Church would remain open. She discussed her possible donation of $35,000 with Rev. Vartzelis. He asked her if she wanted the donation listed in the Bulletin and she said she did not. He responded that her recently deceased brother, Gerald, had done a great deal for the Church and that she should make a donation in his memory. She agreed and the Bulletin listed the gift as made in his memory. She made the donation based on her faith that the contribution would help maintain the

Church, "... now and in the future." If she had known the Archdiocese was giving any consideration to closing the Church, she would not have made the contribution.

Waldo Maffei died on January 13, 2003. Rev. Vartzelis presided at the funeral. At the time of the funeral, Rev. Vartzelis discussed with Catherine Maffei the possibility of establishing a scholarship in his name as a lasting remembrance. They agreed and established the Waldo Maffei Scholarship, which would annually provide two graduating high school seniors, one from Wellesley and one from Natick, each with a $500 college scholarship. At Waldo's funeral, Rev. Vartzelis told Catherine, "There will always be a St. James the Great Church." The Defendant, in his Answer, stated it had insufficient information to admit or deny these averments.

Rev. Vartzelis's term as Pastor ended a few months later and he retired. St. James was in a Cluster of Parishes, the Wellesley-Weston Cluster, which also included St. John the Evangelist and St. Paul, both of Wellesley, and St. Julia of Weston. The Pastor of St. Paul was Rev. Robert Fitzgerald, who was also the head of Archdiocese Clergy Personnel. After the retirement of Rev. Vartzelis, two of the Cluster Parishes, St. James and St. Julia, did not have Pastors. Rev. Fitzgerald chose a Pastor, which has a six-year term, at St. Julia. He named Rev. Daniel Crowley as Administrator, which does not have a fixed term, at St. James. Rev. Fitzgerald told Rev. Crowley that he was only naming him as an Administrator because he was not sure how long St. James would stay open.

In early January, 2004, the Archdiocese had each Cluster recommend one or more Cluster Parishes to close. The Cluster designated St. James as the most feasible to close, with the expressed proviso that the Cluster would be best off if St. James remained open. On October 5, 2004, then-Archbishop O'Malley issued the Decree of Suppression, effective October 31, 2004.

Rev. Vartzelis presided at one of the last Masses, after which Eileen Hanafin said, "Father, why didn't you tell us the Church was closing?" He responded, "I really didn't know it, Eileen." He was visibly upset.

The Parishioners of St. James, pursuant to Canonical Procedure, filed an Appeal of the Decree of Suppression. The Petitioners, as Parishioners, are Signators to the Petition. The first step of the Appeal was to Archbishop O'Malley. On November 10, 2004, he denied, the Appeal, stating, inter alia,

> The fact that my predecessor chose not to name Fr. Crowley as a Pastor, but rather as an Administrator shows that this parish has long been seen as a place that could potentially close . . .

The Canonical Appeal is now at the highest level of Canonical Recourse, the Apostolic Signatura in Rome, Italy. The Canonical Appeal involves the Suppression of St. James the Great Church. The Appeal to the Apostolic Signature does not request recourse for any of the claims filed by the Petitioners in the Middlesex Superior Court and with respect to which the Petitioners are filing this Petition for Certiorari.

Rev. Mark O'Connell serves as Assistant to the Moderator of the Curia for Canonical Affairs for the Archdiocese of Boston. The Archdiocese submitted his Affidavit in the Action of *Mary Akoury, et als., Plaintiffs vs. Roman Catholic Archbishop of Boston, Sean Patrick O'Malley, as Corporation Sole, Defendant*, Suffolk Superior Court No. 04-3803B. In his Affidavit, he stated, inter alia, that the Code of Canon Law is the Universal Law of the Church; the current Code of Canon Law was promulgated in 1983 and consists of 1,752 "Canons"; that the Church is divided into portions called "dioceses", each under the authority of a bishop; that a Church is a juridic person; and that once a juridic person is suppressed, the Canon law provides that its property [in that case, the "goods and obligations of St. Albert's Church in Qunicy] became goods and obligations of the Archdiocese of Boston.

In November, 2004, Archbishop O'Malley had stated that it was closing Parishes for a number reasons, which included its financial crises, one aspect of which was the need to raise funds to fund settlements of priest sexual abuse claims. He also stated that there was a shortage of Priests. The Archdiocese also stated that one determination in determining whether to close a Parish was the size of its Parishioner base. The Archdiocese sent Rev. O'Connell to discuss closure with Parishioners of St. Bernard's in Newton, which Archbishop O'Malley also announced he would close and which is located at a very lucrative property. St. Bernard's had a much larger Parishioner base than other Churches in its cluster which were not selected to close. Rev. O'Connell stated that the Church was too big and that the Archdiocese wanted to, ". . . get back to smaller Parishes" and that the Archdiocese had, ... plenty of Priests" and that the closings were not motivated by a shortage of Priests.

II. The Petitioner's Action and Decision of the Massachusetts Supreme Judicial Court.

The Petitioners filed their action in the Middlesex Superior Court on June 8, 2005. The Petitioners filed a Motion for a Lis Pendens and a Motion for a Speedy Trial and the Defendant Archdiocese of Boston ("Archdiocese") filed a Motion to Dismiss for Failure to State a Claim, pursuant to Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure. On August 5, 2005, the Superior Court, Smith, J., allowed the Motion for a Lis Pendens Motion for a Speedy Trial, and denied the Motion for Judgment on the Pleadings. On the denial of the Motion for Judgment on the Pleadings, the Court made the written notation,

> . . . this complex matter needs to be addressed at the summary judgment level. Further the Court notes that the plaintiff relies on items and facts which are not part of the complaint, thus forcing this Court either to completely ignore the outside matters or to treat this motion as a motion for summary judgment. The defendant has leave to re-cast its motion to dismiss as a motion for summary judgment.

On its allowance of the Motion for Speedy Trial, the Court made the written notation,

> . . . however, this matter shall not be scheduled for trial until after the Court has ruled on the summary judgment motion the Court has invited the defendant to file.

On December 7, 2005, the Superior Court conducted the hearing on cross-motions for summary judgment. On March 27, 2006, the Superior Court allowed the Motion for Summary Judgment of the Archdiocese and denied the Motion for Summary Judgment of the Plaintiffs.

The Plaintiffs appealed and on July 21, 2006, the Massachusetts Supreme Judicial Court allowed the Plaintiffs' Motion for Direct Appellate Review. On July 25, 2006, the Massachusetts Supreme Judicial Court issued its decision, in which it stated that its review was "informed and limited" by bedrock principles of the First Amendment of the United States Constitution. By letter hand-delivered to the Supreme Judicial Court on June 8, 2007, the Plaintiffs requested the Supreme Judicial Court reconsider its decision, including numerous factual findings, which Plaintiffs contended were without support, and also including the Court's application of First Amendment principles. On July 24, 2007, the Supreme Judicial Court issued a decision, which involved amendments to the original decision. The Amendments dealt with removal of several of the factual findings, but the Court did not disturb its application of First Amendment principles.

The decision of the Supreme Judicial Court invoked First Amendment principles which it stated limited its review of the Plaintiff's claim, as follows:

(1) The Court said that, insofar as the plaintiffs' causes of action are predicated on the alleged fiduciary or confidential relationship between a member of the clergy and his congregants, the First Amendment prohibited the Court from

inquiry into any pastoral duties owed by the priesthood to its laity concerning matters of canon law (page 237, bottom paragraph); App. 3a.

(2) The First Amendment places beyond the Court's jurisdiction disputes involving church, "doctrine, canon law, polity, discipline, and ministerial relationships," and that among the religious controversies off limits to the Courts are promises by members of the clergy to keep a church open; (Page 243, first full paragraph); App. 12a.

(3) The First Amendment standards forbid consideration of the religious obligations, if any, of a clergy member to his or her congregants, or of the "trust and confidence" that may be engendered in congregants solely by virtue of the clergy's religious authority; (Page 244, first full paragraph); App. 14a-15a.

(4) The Court must also stand apart from questions of canon law; of whether a member of the clergy had any fiduciary, confidential or other duty to discuss with the plaintiffs the nature of property under canon law (Page 244, first full paragraph); App. 14a-18a.

(5) The Court may not inquire into the ecclesiastical authority of a member of the clergy to bind the Archdiocese by making oral promises about church property, may not examine the actual status or disposition of church property under canon law, and may not attempt to interpret any particular provision of canon law, because as a matter of constitutional law, these matters are beyond the Court's authority (Page 244, first full paragraph); App. 14a-15a.

(6) In disposing of the Maffei's contention that they reposed "trust and confidence" in Reverend Lord, the Court said that a ruling that a Roman Catholic priest, or a member of the clergy of any religion, owes a fiduciary-confidential relationship to a parishioner that inheres in their shared faith and nothing more is impossible as a matter of law (p. 249); App. 21a-22a

(7) The Court distinguished decisions in other jurisdictions which stated that one who acts in the capacity of a "spiritual adviser" over a donor has a confidential relationship to the donor that requires the Donor to justify any gift made to him or her by the donor, on the ground that these decisions predated the Supreme Court's jurisprudence, such as *Serbian E. Orthodox Diocese for the U.S. & Can. vs. Milivojevich*, 426 U.S. 696 (1976), and the Court's own decision of *Fortin vs. Roman Catholic Bishop of Worcester*, 416 Mass. 781, *cert. den.* 511 U.S. 1142 (1944), and the Court did not consider them weighty authority (Pages 249-250, footnote 24); App. 22a-23a.

(8) The Maffeis can not advance their claim of negligent misrepresentation on the ground that Reverend Lord had a duty to inform them of the possibility that the Church could be suppressed, because the Court can not consider Canon law providing for suppression. (Page 255, first full paragraph). App. 32a.

REASONS FOR GRANTING THE PETITION

The decision of the Massachusetts Supreme Judicial Court is in conflict with decisions of other State Court concerning whether the First Amendment prevents a Court from considering the "trust and confidence" which a Congregant reposes in a member of the Clergy in determining whether there has been a breach of trust with respect to the Congregant's gift. The decision also is in conflict with a decision of the Second Circuit Court of Appeals concerning whether a Civil Court can consider a tenant of a religious order, if the matter has not been submitted to an ecclesiastical tribunal.

It is also in the public interest for the Supreme Court to resolve whether the same laws apply to gifts made by Congregants to Religious Organizations as apply to gifts to other Charitable Organizations.

I. The Decision Conflicts with Other State Court Decisions Concerning the Court's Consideration which a Congregant May Repose in a Member of the Clergy.

Other state courts have ruled that the inherent trust between a Congregant and a member of the Clergy can be considered, to the extent that a gift or transaction between a donor and his/her Church carries a presumption of undue influence and that the burden is imposed upon a Spiritual adviser to prove that the donor was free from influence. *See Nelson vs. Dodge*, 68 A.2d 51, 57 (Supr. Ct. RI 1949). In *Corrigan vs. Pironi*, 48 N.J. Eq. 67, 23 Atl. 355 (1891), the Court of Appeals and

Errors of New Jersey considered a gift of land by an elderly, eccentric woman to a Priest. The Court stated;

> . . . The respondent was in point of religion a Roman Catholic, and the appellant a Priest of that order, the consequence being that a relationship existed between them which in a legal point of view is deemed confidential. In the presence of such a spiritual ascendancy, all gifts or benefactions from the subject of such an influence to the possessor of it have been frequently avoided on the grounds of public policy, and without any suspicion that fraud imposition of any kind had been practiced. Such a situation in itself naturally suggests the idea of a donor possessed with a general purpose, without thought or self-guidance as to the mode of execution, and ready to adopt without hesitation any suggestion on the subject. In such a pretense of thought, it is incumbent on the donee to show, not only that his own conduct has been fair and wholly unobjectionable, which has been shown in the case, but to show, further, that thee donor has not acted from the influence of an implicit confidence, rather than the exercise of her own reason. . . .

Corrigan, pp. 355-356.

The Court of Appeals of Maryland ruled that this principle is applicable not only to gifts, but also to contracts and conveyances for valuable consideration because, as a general rule, relief will be afforded in equity

in all transactions in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The Court also ruled that for the Church or spiritual authority to sustain its burden that the power conferred by the relation was not abused, the donee must prove that the donor had either competent or disinterested advice, or had performed a not unreasonable act with knowledge of its nature and as a result of free exercise of independent will. *Farmer vs. O'Carroll*, 162 Md. 431, 160 A. 12, 17, 18 (Ct. Appls. Md. 1932). *See also Brown vs. Father Divine et als.*, 173 Misc. 1029, 18 N.Y.S. 2d 544 (Supr. Ct., Special Term, New York County, 1940).

The Massachusetts Supreme Judicial Court distinguished these cases on the basis that they preceded First Amendment decisions such as *Serbian E. Orthodox Diocese for the U.S. & Can. vs. Milivojevich*, 426 U.S. 696 (1976) (*See* Court's decision, pages 249-250 App. 22a-24a, at footnote 4), However, in a decision subsequent to this Court's decision in *Serbian E. Orthodox*, the District of Columbia Court of Appeals, in its decision, dated November 3, 1992, ruled that in determining whether there was undue influence in connection with a gift from a Congregant, the fact that there were threats of divine retribution from the pulpit could be considered, particularly where there were similar threats imposed upon the donor on a "one to one". The Court summarized the general First Amendment concerns, as follows:

> The Free Exercise Clause embraces two concepts-freedom to believe and freedom to act. *Cantwell vs. Connecticut*, 310 Mass 296,

> 303 (1940); see also *Employment Div. vs. Smith*, 494 U.S. 872, 877 (1990). The first is absolute, but in the nature of things, the second cannot be. *Cantwell*, supra, 310 U.S. 303-304. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. *Reynolds vs. United States*, 98 U.S. 145, 166 (1879); see also *Smith*, supra, 494 U.S. at 877-879. To permit someone to engage in activities which would otherwise be proscribed by law, upon the ground that such conduct is required by his or her religion, would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Smith*, supra, 494 U.S. 879, citing *Reynolds*, supra, 98 U.S. at 167. Accordingly, the right of Free Exercise of "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). *Smith*, supra, 494 U.S. at 879.

Roberts-Douglas vs. Meares, 624 A.2d 405, 423 (D.C. App. 1992).

In applying these principles , the Court stated that evidence of threats of divine retribution made to the congregation as a whole could be received and considered, particularly as there was also evidence of similar threats being delivered to the donor on a "one on one" basis. *Roberts-Douglas*, supra, at page 424.

II. The Decision of the Supreme Judicial Court Conflicts with a Decision of the Second Circuit Court of Appeals with Respect to a Court's Jurisdiction to Consider Ecclesiastical Law.

As previously stated, the Massachusetts Supreme Judicial Court stated that the First Amendment forbids consideration of disputes involving doctrines concerning church doctrine or canon law; that the First Amendment forbids consideration of the religious obligations of a clergy member to his or her congregants; and that the Maffeis could not advance their claim of negligent misrepresentation on the ground that Reverend Lord had a duty to inform them of the possibility that the Church could be suppressed. (Maffei decision, pages 243, 244 and 255). App. 22a-24a. This ruling, that the Court can not consider the principles of the religion, for any purpose, is in conflict with the interpretation of the First Amendment of the Second Circuit Court of Appeals. In its decision *Martinelli vs. Bridgeport Roman Catholic Diocesan*, 196 F.3d 409 (2d Cir. 1999), the Plaintiff was claiming that the sexual assault which he suffered from a clergyman was in violation of a fiduciary relationship which the Plaintiff had with the Diocese. The Second Circuit ruled that in determination of whether there was a fiduciary relationship, the First Amendment did not prevent the consideration of religious doctrines and practices, including evidence at trial that the Plaintiff was taught that the bishop is like a "shepherd" to his "flock" of parishioners, and testimony about the status and responsibilities of the bishop under Canon Law. The Second Circuit ruled that the First Amendment did not preclude the introduction of this evidence. The Second Circuit stated that the First Amendment does not

prevent Courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters, and that while the First Amendment values are plainly jeopardized when litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice, that in this case the District Court had not made any decision for or against any religious doctrine or practice. *Martinelli, supra,* at pages 430 and 431.

The Second Circuit continued that where a person's beliefs are alleged to give rise to a special legal relationship between him and his church, the Court may be required to consider with other relevant evidence the nature of the person's beliefs in order properly to determine whether the asserted relationship in fact exists. The Second Circuit analogized the consideration of religious tenets to the admission of an out-of-court statement for a non-hearsay purpose,

> . . . Similarly, the proposition that a 'bishop is like a shepherd' to a 'flock of parishioners' cannot be considered by a jury to assess its truth or validity or the extent of the divine approval or authority, but may be considered by the same jury to determine the character of the relationship between a parishioner and his or her bishop.

Martinelli, supra, at page 431.

III. A Definitive Ruling by the Highest Court is Necessary to Determine Whether Donors to Religious Institutions Have the Same Rights as Donors to Other Charitable Institutions.

The Court should review the decision of the Massachusetts Supreme Judicial Court to resolve whether Donors who benefit religious institutions are entitled to require that the religious institution use their gifts for the intended purpose. To require that these donors have the same rights and causes of action as they would have if they had chosen to bestow their gift upon a non-religious charity would be totally consistent with the "ground rules" as to which religious institutions have generally represented they would comply. Religious institutions have requested and received favorable tax status under Internal Revenue Code Section 501(c)(3) so that the donors can deduct the contributions for either income tax or estate and gift tax purposes. As the religious institutions have requested governmental involvement as far as obtaining favorable tax treatment, the religious institutions can not complain that the gifts should not be held to scrutiny as far as the propriety of either the solicitation or use of the gifts is concerned.

Also, the Archdiocese of Boston was created by the Legislative Act of 1897 creating the Archdiocese as a corporation sole, Acts 1897, Chapter 506, Section 2 of which states:

> That said corporation shall be empowered to receive, take and hold, by sale, gift, lease, devise, or otherwise, real and personal estate of every description, for religious, charitable

> and burial purposes, and to manage and dispose of the same for the religious and charitable purposes of the Roman Catholic church, subject to the laws of the Commonwealth and to the terms of any trust set forth in any bequest, devise, deed or conveyance of any said estate, with such limitations as may by law govern any such trust, with full power, subject to the laws of the Commonwealth and the terms of such trusts, to convey the said estate by deed of mortgage fore the payment of money as well by deed absolute.

As the Archdiocese accepted the terms of this Act by incorporating as a corporation sole pursuant to the Statute, then the review of Gifts made to the Archdiocese pursuant to the statute, and in particular to determine whether the gifts are devoted to the "religious, charitable and burial uses" intended, is not excessive governmental interference.

The review of the decision of the Massachusetts Supreme Judicial Court is also necessary because there is a widespread concern that some religious institutions are suffering from financial problems and possibly utilizing gifts in a manner which is not intended. A sad example is the funding of the Priest Retirement by the Archdiocese of Boston. For decades, the Archdiocese has announced that the contributions to both the Christmas and Easter Mass collections would be devoted solely to the funding of the Retired Priests Pension and Medical Programs. However, the retirement fund is at a critical shortage, and the Archdiocese later disclosed that for

approximately twenty years the Pension portion of the program had not received any contributions. Given the holding of the Massachusetts Supreme Judicial Court, the donors could not contest the use of their donations, as the Court would prohibit the reference to solicitations made during the Masses. The decisions of the other states would not permit such a failure to apply the contributions as implied in the solicitations, and this Court should allow the Petition to rule whether the First Amendment requires this result.

Another instance of application of a Donor's gift for an unintended use is the appropriation of gifts and proceeds to fund the Priest Sexual Abuse settlements. In November, 2004, then Archbishop O'Malley stated in his discussion of the need for Parish Closings that there was a financial crisis, one aspect of which was the need to fund settlement of Priest Sexual Abuse. The Archdiocese has since stated that no funds from closings were directly used to pay settlements, but one must practically conclude that this is little more than an accounting nuance: as the Archdiocese had to fund $100,000,000 of uninsured Priest Sexual Abuse Claims, then this payment inevitably depleted the Archdiocesan funds, and its ability to fund other debts, by this amount. The Archdiocese obviously can not hope to raise funds directly from Parishioners to fund these settlements. For the Archdiocese to liquidate gifts previously made by unsuspecting donors to pay for what it can not raise from Donors directly is a very sad and unfortunate circumstance, and to interpret the First Amendment to block the attempts of unsuspecting Donors to seek recourse to require that their gifts be used as all had intended is both incorrect as a matter of law and worthy of review by the highest Court.

IV. The Massachusetts Supreme Judicial Court Erroneously Applied First Amendment Law in Its Dismissal of the Petitioners' Claims.

The Supreme Judicial Court's dismissal of the Petitioners' claims was a result of its interpretation of rulings of the U.S. Supreme Court, as preventing consideration of both (1) a member of the Clergy's representations to its Congregants and (2) the undisputed provisions of Canon law. The incorrect application of these principles resulted in the dismissal of the Petitioners' claims.

A. The First Amendment Does Not Bar Consideration of the Clergy's Solicitations.

The Freedom of Religion clause of the First Amendment embraces two concepts: the freedom to believe and the freedom to act. The freedom to believe is absolute, but the freedom to act is subject to regulation for the protection of society. *Cantwell vs. Connecticut*, 310 U.S. 296, 305 (1940). In *Cantwell*, the U.S. Supreme Court ruled that the power to regulate for the protection of society permitted a state, by general and non-discriminatory legislation, to regulate the times, places and manner of soliciting upon its streets, an d of holding meetings thereon, and in other respects safeguard the peace, good order and comfort of the community. *Cantwell, supra*, at page 304.

The Freedom of Religion Clause similarly does not limit the State, by application of its general and non-discriminatory laws, to regulate the solicitation of gifts and contributions to religious charities, particularly as

religious institutions have voluntarily involved the State in the donative process, by seeking favorable tax treatment for the contributions. Review of the solicitations and representations, in the same manner as review of donations to non-religious charities would be subject, is both of a general and non-discriminatory nature, and not in violation of the Free Exercise Clause. The Courts of the States of New Jersey, Maryland, New York and Rhode Island, have ruled that the gifts to religious institutions are subject to traditional common law remedies. *See Corrigan vs. Pironi*, 48 N.J. Eq. 67, 23 Atl. 355 (1891); *Farmer vs. O'Carroll*, 162 Md. 431, 160 A. 12, 17, 18 (Ct. Appls. Md. 1932). *Brown vs. Father Divine et als*, 173 Misc. 1029, 18 N.Y.S. 2d 544 (Supr. Ct., Special Term, New York County, 1940); and *Nelson vs. Dodge*, 68 A. 2d 51, 57 (Supr. Ct. RI 1949). These decisions are more extensively discussed in Section I, p. 19, *supra.*

Similarly, these cases have permitted that a finding of "trust and confidence" between the member of the Clergy and the Congregant could be made, based on the shared faith and the spiritual ascendancy of the Clergy member.

The Massachusetts Supreme Judicial Court ruled that Free Exercise Clause prevented consideration of the representations of the Clergy and also precluded a finding of "trust and confidence" between the Clergy and the Congregant. The Supreme Judicial Court relied on this Court's decision in *Serbian Eastern Orthodox Diocese vs. Milivojevich*, 426 U.S. 696 (1976). However, this Supreme Court Decision does not set down the limitations as interpreted by the Supreme Judicial Court.

The Supreme Court, in the *Serbian Eastern Orthodox* decision, stated,

> [T]he rule of action which should govern the civil courts ... is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law *have been decided by the highest of these church judicatories to which the matter has been carried*, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Serbian Eastern Orthodox Diocese vs. Milivojevich, 426 U.S. 696, 710 (1976), citing *Watson vs. James*, 13 Wall. 679, 727 (1872) (emphasis supplied).

The Supreme Court concluded,

> In short, the First and Fourteenth Amendments permit hierarchical organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over those matters. *When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.*

Serbian Eastern Orthodox Diocese vs. Milivojevich, 426 U.S. 696, 724-25 (1976) (emphasis supplied).

The *Serbian East Orthodox* decision in no way pertains to whether the representations of the Clergy are protected by the Free Exercise Clause or preclude a finding of "Trust and Confidence" between the Clergy and the Congregant.

The Supreme Judicial Court further stated that a ruling that a Roman Catholic priest, or a member of the clergy of any religion, owes a fiduciary-confidential relationship to a parishioner that inheres in their shared faith and nothing more is impossible as a matter of law (*Maffei*, supra, at App. 22a). The Supreme Judicial Court is apparently applying a test somewhat similar to the District of Columbia Court of Appeals in *Roberts-Douglas vs. Meares*, 624 A. 2d 405, 423 (D.C. App. 1992), supra, which concluded that evidence of threats of divine retribution made to the congregation as a whole could be received and considered , particularly as there was also evidence of similar threats being delivered to the donor on a "one on one" basis. *Roberts-Douglas*, supra, at page 424.

The Supreme Court's decisions concerning the Free Exercise Clause, however, do not require that the Clergy have "one on one" contact with the Congregant-donor. One can easily recognize that such a limitation would remove from scrutiny the great majority of religious contributions made, and is not justified.

In any event, both the donations/contributions of the Maffei family and Eileen Hanafin had significant "one on one" contact to fall within the test suggested by the *Roberts-Douglas* court. With respect to Reverend Lord's communications with Waldo Maffei, Reverend Lord had

met with Waldo Maffei on two occasions and had identified the Maffei land as the only site where the Church could be built, before making the representation that the property would "forever" be used as a Church in honor of James Maffei. With respect to the gift of Eileen Hanafin, Reverend Vartzelis met with Eileen Hanafin and suggested that the gift be in honor of her late brother. While these communications were not in the form of duress or threats, as was present in the *Roberts-Douglas* case, there is certainly arguably the same considerable inherent emotional involvement, which would justify the consideration of both the "inherent" faith emanating from the shared religion and the "individual" solicitations/ communications between the Clergy member and the Congregant.

B. The Court Can Consider Undisputed Provisions of Canon Law.

The Petitioners' Complaint contended that Canon law provided for the Suppression of Churches, and attached as an Exhibit the Affidavit of Rev. Mark O'Connell, the Archdiocese's Assistant to the Moderator of the Curia for Canonical Affairs for the Archdiocese of Boston, which the Archdiocese itself submitted in the Action of *Mary Akoury, et als., Plaintiffs vs. Roman Catholic Archbishop of Boston, Sean Patrick O'Malley, as Corporation Sole, Defendant*, Suffolk Superior Court No. 04-3803B. The Affidavit itself refers to the Canon law provision for suppression of a Church.

The Supreme Judicial Court, relying on *Serbian East Orthodox*, stated that it could not consider evidence of the Canonical provision for suppression, stating

> (1) [The Court] may not attempt to interpret any particular provision of canon law, because as a matter of constitutional law, these matters are beyond the Court's authority.

(Page 244, first full paragraph); and (App. 22a).

> (2) The Maffeis can not advance their claim of negligent misrepresentation on the ground that Reverend Lord had a duty to inform them of the possibility that the Church could be suppressed, because the Court can not consider Canon law providing for suppression.

(Page 255, first full paragraph). (App. 31a).

However, the Court in *Serbian East Orthodox* was considering judicial review of a decision of an Ecclesiastical Tribunal, and concluded that a Civil Court can not review such a decision. The Petitioners' Complaint, however, did not seek review of any decision of an Ecclesiastical Tribunal. In fact, the Archdiocese's own Canon law expert had introduced the same canonical provision in another action. The Free Exercise Clause does not preclude the introduction of the provision, *see Martinelli vs. Bridgeport Roman Catholic Diocesan*, 196 F.3d 409 (2d Cir. 1999), and the ruling of the Supreme Judicial Court is in error.

C. The Erroneous Application of First Amendment Principles Resulted in the Dismissal of the Petitioners' Claims

The Supreme Judicial Court's decision first excludes from its consideration, on the basis of its construction of the Free Exercise Clause, the evidence of representations and communications upon which both the Maffei and Hanafin claims were based. The decision proceeds to state that the remaining allegations are insufficient to survive a Motion to Dismiss. Specifically, the decision states, with respect to both claims:

> (1) The claims of all three plaintiffs rest, in whole or in part, on the presumption that the RCAB owed them a legal duty, grounded in the "trust and confidence" inherent (they allege) in the priest-parishioner relationship, to inform them that, under Canon law, St. James could be suppressed at any time.

(*Maffei*, p. 237); and (App. 3a).

> (2) We may not inquire into the ecclesiastical authority of Reverend Vzrtzelis and Reverend Lord to bind the RCAB by making oral promises about church property, to examine the actual status or disposition of church property under canon law, or to attempt to interpret any particular provision of canon law. As a matter of constitutional law, such disputes are beyond our authority.

(*Maffei*, p. 244). (App. 14a).

As the Petitioners suggest that both of these statements are based on an erroneous application of First Amendment law, should the Supreme Court determine that the Supreme Judicial Court's application of this law was in error, the claims of all Petitioners must be reopened for consideration in light of the correct principles of law.

The Supreme Judicial Court, in disposing of the Maffei's claims for negligent misrepresentation, stated that there was no evidence of a fiduciary or confidential relationship between the Maffeis and the Archdiocese other than, "... the constitutionally impermissible grounds urged on us by the Maffeis ..." *Maffei*, p. 250. Similarly, if the First Amendment does not bar consideration of the averments made by the Petitioners, the issue as to whether they had a fiduciary or confidential relationship would again have to be reviewed.

CONCLUSION

At a time where there is a crisis concerning the propriety and use of contributions to religious organizations, the decision of the Massachusetts Supreme Judicial Court applies the Free Exercise Clause to all but prevent any legal action for violation of the trust and confidence inherent in same. The Petitioners urge the Supreme Judicial Court to grant certiorari.

Respectfully submitted,

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